SUPREME COURT, U.S.
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Nos. 95-1197 and 95-1200

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS (No. 95-1200), *and* National Association of Broadcasters, et al., Petitioners (No. 95-1197),

Petitioners,

v.

ZELL MILLER, et al.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

Section 315(b) of the Communications Act of 1934 provides that during certain periods the charges made for use of any broadcasting station by any legally qualified candidate for public office shall not exceed the lowest unit charge of the station for the same class and amount of time for the same period. The Federal Communications Commission ("FCC") issued a declaratory ruling purporting to preempt all state causes of action dependent on any determination of the lowest unit charge under Section 315(b), or of any other duty arising under that subsection, and purporting to constitute the FCC as the sole forum for adjudicating such matters. Based upon the record and the arguments set forth in each Petition, the Respondents understand the three questions presented by the Petitioners to be: (1) whether the Respondents' petition to the United States Court of Appeals for the Eleventh Circuit, for review of the Declaratory Ruling pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, presented a justiciable case or controversy, and (2) if Respondents presented a justiciable case or controversy, whether the FCC has authority to issue a declaratory ruling purporting to preempt any such matters and purporting to constitute itself as the exclusive forum for adjudicating any such matters, and (3) if the FCC has such authority, whether the Declaratory Ruling was valid in this case.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners in the court of appeals were Zell Miller; Zell Miller For Governor; Pierre Howard; Georgians For Howard '90; Johnny Isakson; Johnny Isakson For Governor; Andrew Young; Young Working For Georgia; Lauren McDonald; Lauren McDonald For Governor; Roy Barnes; Roy Barnes For Governor; Tim Ryles; Tim Ryles For Insurance Commissioner; Warren Evans; Warren Evans Election Committee; William L. Dickinson, Second District Campaign Committee; William J. Cabaniss; Friends of Bill Cabaniss Committee; Spencer T. Bachus, III; Bachus For Attorney General Committee; John Teague; James E. Folsom, Jr.; Jim Folsom, Jr. For Lieutenant Governor Committee; Fob James; Fob James For Governor Committee; Kenneth D. Wallis; Alabamians For Ken Wallis Committee; George D.H. McMillan, Jr.; The McMillan Committee; George Wallace, Jr.; Wallace For Treasurer Committee; Charles A. Graddick; Graddick For Governor Committee; William J. Baxley; Friends Of Bill Baxley; Paul Hubbert; Richard Shelby; Don Siegelman; Jimmy Sullivan; Sonny Hornsby; Friends of E.C. Sonny Hornsby; Mark Kennedy; Judge Mark Kennedy For Supreme Court; and Friends Of Judge Mark Kennedy (collectively, the "*Candidates*"). The Candidates are the Respondents in this Court in Nos. 95-1197 and 95-1200, and have filed, simultaneously herewith, a *conditional* consolidated Cross-Petition For a Writ of Certiorari in Nos. 95-1197 and 95-1200.

The United States and the Federal Communications Commission were respondents in the court of appeals, and are the Petitioners in No. 95-1200.

Respondents-intervenors in the court of appeals were Capital Cities/ABC, Inc.; Chris-Craft Industries, Inc.; The Times Mirror Company; American Family Broadcast Group, Inc.; Allbritton Communications Company; CBS, Inc.; Chronicle Publishing Co.; Fox Television Stations, Inc.; Gillett Broadcasting of California, Inc.; Gillett Communications of San

Diego, Inc.; Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; Lin Television Company; McCraw-Hill Broadcasting Company, Inc.; Midwest Television, Inc.; National Broadcasting Company, Inc.; The New York Times Company; Post-Newsweek Stations, Inc.; The Providence Journal Company; The Spartan Broadcasting Company; Tribune Broadcasting Company; Westinghouse Broadcasting Company, Inc.; WKRG-TV, Inc.; WTVT, Inc.; Meredith Corporation; A.H. Belo Corporation; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; and the National Association of Broadcasters (collectively, the "*Broadcasters*"). The Broadcasters filed a separate Petition For A Writ of Certiorari, docketed in this Court as No. 95-1197.

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STATEMENT OF THE CASE

Respondents are legally qualified candidates for public office (the "Candidates") who filed a petition in the United States Court of Appeals for the Eleventh Circuit to review an order (the "Declaratory Ruling") issued by the Federal Communications Commission ("FCC"). The Petitioners in this Court are the United States of America and the FCC (the "FCC")(Case No. 95-1200), and the owners of various television broadcast stations regulated by the FCC (collectively, the "Broadcasters")(Case No. 95-1197). The Candidates adopt the Petitioners' Statements of the Case, except as follows:

(1) The judgment of the United States District Court for the Northern District of Georgia in the *Zell Miller* case described in the Petition for a Writ of Certiorari filed by the FCC, No. 95-1200 (hereinafter the "*FCC Petition*") at page 8, holding that there is no implied federal cause of action for violations of Section 315(b), has been vacated. *See Zell Miller For Governor v. Pac. & S. Co.*, No. 1:91-CV-267-RLV (N.D. Ga. June 4, 1991), *vacated*, No. 91-8561 (11th Cir. Dec. 28, 1992).

(2) In the Declaratory Ruling, the FCC ruled that "any state cause of action *dependent on any determination of the lowest unit charge* under Section 315(b) of the Communications Act of 1934, *or of some other duty arising* under that subsection, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission." *Appendix to FCC Petition* (hereinafter "*FCC App.*") at 16a (emphasis added). Various characterizations of the Declaratory Ruling by the Petitioners describe the matters which the FCC purported to preempt more narrowly than such matters were described by the FCC in the Declaratory Ruling. The Declaratory Ruling does not, as appears to be

suggested in the Petitions,[1] purport to limit its preemptive effect to state causes of action alleging *violations* of Section 315(b); the Declaratory Ruling extends to all matters dependent upon any determination of any duty imposed upon broadcasting stations by Section 315(b).

(3) As set forth below in the Reasons for Denying the Petitions, the Candidates do not agree with the legal arguments included within the Statement of the Case set forth at page 4 of the Broadcasters' Petition, to the effect that the decision of the court of appeals conflicts with prior decisions of this Court and decisions of other courts of appeals.

(4) The FCC states that it has "adjudicated numerous disputes between candidates and broadcasters over political advertising charges" and that it has "ordered rebates to candidates" for violations of Section 315(b). *FCC Petition* at 5. This statement gives the erroneous impression that the FCC has the authority to issue orders to pay refunds which are enforceable by candidates. In fact, the FCC's authority is limited to the imposition of administrative sanctions (47 U.S.C. § 312) (*e.g.* license revocation), or forfeiture penalties (47 U.S.C. § 503(b)). None of the orders referred

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[1] *See FCC Petition* at I ("whether the court of appeals should have upheld the Federal Communications Commission's (FCC) authority to provide, by declaratory ruling, that causes of action purportedly based on state law but *alleging violations of the federal "lowest unit charge" requirement* are preempted, and that *all such disputes over violation of that requirement* must be adjudicated by the FCC, subject to judicial review exclusively in the federal courts of appeals.") (emphasis added); *Petition For a Writ of Certiorari of National Association of Broadcasters, et al.,* No. 95-1197 (hereinafter *"Broadcasters' Petition)* at i ("The Federal Communications Commission issued a declaratory ruling that pre-empted all state law claims that purport to be *based upon a violation* of Section 315's lowest unit charge requirement.") (emphasis added); *id.* ("Whether challenges to an FCC order pre-empting state law causes of action *based solely on alleged violations* of the "lowest unit charge" requirement in Section 315 (b) are reviewable by a court of appeals pursuant to Section 402 (a) of the Communications Act and 28 U.S.C. § 2342, and whether that preemption order was valid.") (emphasis added).

to in the FCC's Petition was enforceable by candidates themselves. Section 401(b) of the Communications Act, moreover, specifically excludes orders for the payment of money from the category of orders which may be enforced by the courts.

REASONS FOR DENYING THE PETITIONS

The Petitioners ask this Court to review three questions: (1) whether the Candidates' petition to the court of appeals to review the Declaratory Ruling presented a justiciable case or controversy, (2) if so, whether the FCC had authority to issue the Declaratory Ruling, and (3) if so, whether the Declaratory Ruling was valid. By presenting not only the first two questions (which were addressed by the court of appeals), but also the third question (which the court of appeals did not reach), the Petitioners are asking this Court to disregard the actual holding of the court of appeals: "Because we conclude that no case or controversy is presented, we DISMISS the petition for review." *FCC App.* at 15a.

The Candidates respectfully submit that the only questions the Petitioners could present properly to this Court at this time would be whether the Candidates' petition for review presented a justiciable case or controversy, and whether the FCC had authority to issue the Declaratory Ruling, because those are the only issues actually addressed by the court of appeals. "This Court does not normally review orders of administrative agencies in the first instance . . .." *Civil Aeronautics Bd. v. American Air Transport, Inc.*, 344 U.S. 4, 5 (1952). In the event that this Court were to conclude that the Candidates presented a justiciable case or controversy, and that the FCC had authority to issue the Declaratory Ruling, the proper disposition would be to remand this proceeding to the court of appeals to review the

validity of the Declaratory Ruling. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 365 (1955):

> The correction of errors of law by a Court of Appeals on review of administrative agencies is committed to this Court through its certiorari jurisdiction. We have found such errors of law in the decision of the Court of Appeals. Therefore, the decision below cannot stand. But it is not our function to reinstate the determination of the Commission. That would make this Court the reviewing body of the ultimate determination of the Commission. The proper disposition is to remand the case to the Court of Appeals for reconsideration of the record but freed from rulings declared erroneous in this opinion.

On the issue of the FCC's authority to issue the Declaratory Ruling, before dismissing the Candidates' petition, the court of appeals expressed its view that "Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction . . .." *FCC App.* at 10a. As a result, the court of appeals concluded that the Declaratory Ruling would not preclude any candidate from seeking judicial relief in any court, and that the courts would be free to decide the preemption issue in any case filed by any candidate. *FCC App.* at 15a. Having concluded that the courts were free to decide the preemption issue, the court of appeals declined to give an "advisory opinion" on whether Congress itself intended the preemptive effect set forth in the Declaratory Ruling. *See Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

The Candidates submit that, having concluded correctly that the FCC had no authority to issue the Declaratory Ruling, the court of appeals properly declined to render an advisory

opinion on the issue of Congressional intent.[2] Certiorari should be denied in this case because the court of appeals' conclusion that the FCC had no such authority does not conflict with any decision of this Court, or of any other United States court of appeals, or of any state court of last resort; does not present a question which is not already settled by this Court; does not depart from the accepted and usual course of judicial proceedings; and does not call for an exercise of this Court's supervisory power. To the contrary, the court of appeals' decision merely reflects fundamental principles of constitutional law.

There is a "deeply rooted presumption in favor of concurrent state court jurisdiction." *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The "purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention to do so must definitely and clearly appear." *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), this Court held that an administrative agency:

> literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. . . . [The] best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.

The nature of the authority granted by Congress to the FCC is limited in scope to matters involving regulation of interstate and foreign communications by wire and radio. The FCC has no

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[2] Because the court of appeals was clearly correct in concluding that the FCC had no authority to issue the Declaratory Ruling, it is the position of the Candidates that the issue of whether the court of appeals should have entertained the petition and set the Declaratory Ruling aside (rather than dismissing the petition) would not, *alone*, warrant certiorari in this case.

authority or duty to investigate, determine policy, or formulate rules, with respect to preemption of state causes of action or the jurisdiction of any court. *See* Federal Communications Act, 47 U.S.C. §§ 151-613 (the "Communications Act").

The FCC's authority in Section 315(d) of the Communications Act to adopt rules to "carry out" Section 315 does not enlarge its jurisdiction. Section 315(d) simply permits the FCC to elaborate on the meaning of the various terms used in Section 315, and reflects:

> Congress' decision not to legislate in detail, but rather to set out broad categories . . . and leave the Commission with the task of implementing Congressional intent.

Chisholm v. FCC, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

The Communications Act explicitly provides that it does not "in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Although Section 303 of the Communications Act authorizes the FCC to exercise various powers with respect to interstate communications in wire and radio as the public convenience, interest and necessity may require, "[t]his criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943).

Even if Congress had delegated the authority to the FCC to preempt state law causes of action, this Court's recent decision in *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447 (1995) indicates that such a delegation would have been unconstitutional, at least as applied to the federal courts in diversity cases. In *Plaut*, this Court held unconstitutional a federal statute which purported to provide for reinstatement of certain types of securities fraud claims previously held time-barred by this Court. In so holding, this Court identified at least three types of legislation which

could require a federal court to exercise judicial power in a manner that Article III forbids:

> The first appears in *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519 (1872), where we refused to give effect to a statute that was said "[t]o prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.*, 13 Wall. at 146. . . . The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case*, 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 . . . (1948). . . . Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy — with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."

Id. at 1452-1453 (citations omitted). [3]

The Declaratory Ruling purports to prescribe a rule of decision in federal diversity cases by stating that "any state cause of action depending on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subsection that is initiated in a federal court pursuant to diversity jurisdiction also is preempted *and should be dismissed.*" *FCC App.* at 40a-41a n.8 (emphasis added). Depending on how the FCC or the broadcasters would seek to enforce the Declaratory Ruling, the ruling could implicate the other two Article III types of cases identified in *Plaut* as well. *See, e.g., Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), discussed in Section 2(a) below.

In the only opinion of this Court which appears to have addressed a similar situation involving a federal agency, this Court held that a Department of Labor regulation (29 C.F.R. § 500.122(b)), which purported to provide that state workers' compensation benefits constituted an exclusive remedy, was entitled to no deference by the courts:

> Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [the Agricultural Worker Protection Act] motor vehicle provisions. This delegation, however, does not empower the Secretary to regulate the scope of judicial power vested by the

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[3] This fundamental distinction between judicial functions and legislative functions is recognized in state constitutions as well. *See, e.g. Martin v. Baldwin*, 215 Ga, 293, 299, 110 S.E.2d 344, 350 (1959) (*quoting McCutcheon v. Smith*, 199 Ga. 685, 685, 35 S.E.2d 144, 145 (1945):

> The resolution made no change in [the Georgia statute], but merely declared the legislative intent. This "is clearly an attempt by the legislature to perform a judicial function by construing a law, and offends [the separation of powers provisions of the former Georgia Constitution] and is void."

> statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction." Accordingly, the Secretary's conclusion that workers' compensation benefits, where available, provide the exclusive remedy for violations of AWPA is not entitled to *Chevron* deference.

Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) *(quoting Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973)).

The Petitioners attempt to justify the FCC's authority to issue the Declaratory Ruling by making two arguments: (1) the Petitioners argue that the FCC has the authority to issue a ruling, binding upon all state courts and federal courts in diversity cases, that Congress intended to preempt all state law causes of action dependent upon any determination under Section 315(b), and that Congress intended the sole forum for adjudicating such matters to be the FCC; and (2) even if such Congressional intent is lacking, the Petitioners argue that the Declaratory Ruling can be justified as an exercise of plenary power by the FCC to preempt state law causes of action dependent upon any determination under Section 315, and to oust the jurisdiction of the state courts, and the federal courts in diversity cases, to adjudicate such matters. These positions are contrary to the precedents of this Court.

1. **Binding Interpretation of Congressional Intent.** The FCC first attempts to justify the Declaratory Ruling as a proper interpretation of Congress' intent to preempt various state law causes of action. This Court, however, has specifically stated that this type of issue is one peculiarly reserved for judicial resolution. *See Piper v. Chris-Craft Indus.,* 430 U.S. 1, 42 n.27 (1977):

> [The SEC's] presumed "expertise" in the securities-law field is of limited value when the narrow legal issue is

> one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants.

See also Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.").

2. **FCC's Plenary Authority to Preempt.** If Congressional intent is lacking, the Petitioners argue that the FCC itself had plenary authority to preempt all state causes of action requiring a determination of the lowest unit charge, and plenary authority to oust the state courts (and the federal courts in diversity cases) of jurisdiction over such matters, in order to insure uniform interpretations of Section 315(b). Neither the FCC nor the Broadcasters cited any precedent, nor to the knowledge of the Candidates does any exist, where the FCC or any other federal agency has purported to preempt a state law cause of action or to oust state courts (or federal courts in diversity cases) of jurisdiction.

All prior preemption orders issued by the FCC involved the preemption of inconsistent state regulations of wire and radio. *See, e.g., City of New York v. FCC,* 486 U.S. 57 (1988)(preemption of signal-quality regulation of cable television); *State Corp. Comm'n v. FCC,* 787 F.2d 1421 (10th Cir. 1986)(preemption of state utility commission's altering of sampling periods used by local telephone companies to allocate equipment costs); *New York State Comm'n on Cable Television v. FCC,* 749 F.2d 804 (D.C. Cir. 1984)(preemption of state and local entry regulation of SMATV systems); *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 746 F.2d 1492 (D.C. Cir. 1984)(preemption of state restrictions on the resale and sharing of all interstate WATS service used exclusively in interstate commerce); *New York State Comm'n on Cable Television v. FCC,* 669 F.2d 58 (2d Cir. 1982)(preemption of New York cable television statute which

prohibited receipt of federally authorized pay programming on MATV systems).

The Candidates have found only two cases where the FCC purported to decide issues similar to those addressed in the Declaratory Ruling. In both cases, the courts concluded that the FCC acted beyond its authority.

(a) In *Town of Deerfield v. FCC,* 992 F.2d 420 (2d Cir. 1993), the FCC had issued a regulation (47 C.F.R. § 25.104 (1992)), which purported to preempt state and local zoning ordinances that differentiated between certain types of satellite antennas. After four different courts had ruled in favor of the Town of Deerfield and against the owner of a satellite antenna that a specific zoning ordinance enacted by the Town of Deerfield was *not* within the scope of the FCC's preemption, the owner of the satellite antenna petitioned the FCC for a ruling that the Deerfield ordinance was, in fact, preempted, contrary to the prior court rulings. The FCC issued the requested declaratory ruling, and held that each of the four courts had decided the preemption issue incorrectly. *Town of Deerfield,* 992 F.2d at 427. The Town of Deerfield appealed the FCC's ruling to the Second Circuit. On appeal, the Second Circuit reversed the FCC's ruling, stating:

> Congress cannot "prescribe a rule for the decision of a cause in a particular way," nor may Congress, consistent with constitutional principles, provide for executive branch review of a judicial determination. Simply put, if a judgment of an Article III court were subject to revision by a coordinate branch, it would not be the exercise of judicial power. Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power.
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> * * * *

> . . . [T]he Commission in effect sought to modify the jurisdiction of Article III courts, with respect to any issue of the preemptive effect of § 25.104, to deprive them of the power to render anything but advisory opinions. . . . [The] Commission plainly has no power to request or require such a court to render an opinion that is merely advisory. Nor has the Commission called to our attention any authority — and we are aware of none — giving it the power to prevent an Article III court from performing its duty to render a binding judgment in a live case or controversy.

Town of Deerfield, 992 F.2d at 428-429 (citations omitted).

Under the reasoning of *Town of Deerfield,* the FCC does not have the authority, as the Broadcasters argue to this Court, to issue a declaratory ruling which purports to apply "not just prospectively to bar future courts from suits to enforce Section 315(b), but also retrospectively to bar suits initiated prior to the issuance of the Ruling." *Broadcasters' Petition* at 19.[4]

(b) The only other case the Candidates have located where the FCC purported to address a similar issue is *In re Port Huron*

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[4] The specific case which the FCC apparently sought to bar retroactively was *Dickinson v. Cosmos Broadcasting Co.,* Circuit Court for Montgomery, Alabama, Case No. CV-91-67-P (Order, released Sept. 23, 1991). *See FCC App.* at 88a-89a. In that case, a federal district court in Alabama held that a complaint filed in state court by a political candidate against a broadcaster for an alleged violation of Section 315(b) did not present a federal question warranting removal of the case to federal court, and was "essentially local in nature." The federal court remanded the case to the Alabama state court for further proceedings. *Dickinson v. Cosmos Broadcasting Co.,* Civil Action No. 91-T-072-N (M.D. Ala.) (Order, released April 1, 1991). *See FCC App.* at 89a. On remand, the state court denied the broadcaster's motion to dismiss on the grounds of preemption. *Id.* at 93a n.8. In its Public Notice issued on October 10, 1991, the FCC criticized the *Cosmos* case, and explicitly stated that "the Commission believes that it would be advisable for courts to stay any ongoing proceedings pending the issuance of any declaratory ruling as a result of this notice." *See FCC App.* at 93a-94a n.9.

Broadcasting Co., 12 FCC 1069 (1948). In that proceeding, in connection with a broadcasters' license application, the FCC stated, gratuitously, that it believed that Section 315(a) of the Communications Act required the broadcast of defamatory material. This issue was not decided by this Court until eleven years later in *Farmers Educ. and Coop. Union v. WDAY, Inc.,* 360 U.S. 525 (1959), the case in which this Court held that there is federal immunity for broadcasting defamatory material under Section 315(a) of the Communications Act.

Since neither this Court nor any other court had yet ruled on the immunity issue, shortly after the FCC issued its 1948 decision in *Port Huron,* a broadcasting station in Texas brought an action in federal district court to annul the FCC's ruling. *Houston Post Co. v. United States,* 79 F. Supp. 199 (D. Tex. 1948). The station stated that it had a policy of allowing political candidates access to the media, and that unless the FCC's interpretation were set aside, the station would be placed in the untenable position of either broadcasting defamatory statements, or losing its station license for violation of Section 315(a).

In *Houston Post,* the Texas federal court concluded that the FCC could not have intended its opinion to have the force of law, emphasizing that the subject matter of preempting state causes of action was not one within the realm of the FCC's authority or expertise:

> This subject matter in general is the reach and the confines, respectively, of state and federal laws operating in the same general field, a question of the greatest difficulty and delicacy . . ..
>
> * * * *
>
> . . . Indeed, in the uncertain and doubtful state of the law as to the intent of Congress, in enacting the section to exclude the operation of libel laws, we think it judicially inconceivable that the Commission, a body of public servants entrusted by Congress with powers of

> supervision over communications by radio, could, with considerations of fair play and just administration in mind, have so ordered.
>
> In the present state of the law, that is in the absence of congressional action clarifying its intent and purpose, or of authoritative judicial decision, we think it doubtful that the Commission would have power to lay down a binding rule or regulation of the nature of that expressed in its opinion.

Houston Post, 79 F. Supp. at 203-204.

Similarly, in this case, the issue of preemption of state causes of action, and the ouster of state court jurisdiction (and federal diversity jurisdiction) are questions of great difficulty and delicacy, with respect to which the FCC has no expertise. This Court even has difficulty with these kinds of issues. For example, this Court has described the issue of whether a state cause of action is preempted by the National Labor Relations Act as a "knotty problem" which has engendered literally hundreds of court cases and "demonstrated the need for this Court to provide a fuller explication of the premises upon which *Garmon* rests . . .." *Amalgamated Ass'n of Street, Elec. Ry., and Motorcoach Employees v. Lockridge,* 403 U.S. 274, 277 (1971) (*referring to San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959)). The federal courts are frequently required to wrestle with *Garmon* preemption issues.[5] There is no hint in any of these cases that any *Garmon* preemption issue could have been resolved by a plenary "preemption order" by the National Labor Relations Board similar to the Declaratory Ruling issued by the FCC in this proceeding.

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[5] *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6,* 493 U.S. 67 (1989); *Communications Workers v. Beck,* 487 U.S. 735 (1988); *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *International Long Shoremen's Ass'n v. Davis,* 476 U.S. 380 (1986).

The Candidates respectfully submit that it is inconceivable that Congress intended for the FCC to issue a declaratory ruling purporting to have any preemptive effect upon any state law cause of action, or limiting the jurisdiction of any court, much less the vaguely described, and all-encompassing preemptive effect contemplated by this Declaratory Ruling. The Candidates submit that the law in this area is settled, and needs no further elaboration by this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for a writ of certiorari requested by the FCC and by the Broadcasters.

Respectfully submitted,

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